CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, MARCH TERM, 1819.

East'n District. *March*, 1819.

RION vs. *GILLY & AL.*

Rion vs. Gilly & al.

If he who has goods for sale for another, gives an account which is accepted, he may not, afterwards, be called upon, for the price of any part of the goods, not collected.

Appeal from the court of the parish and city of New-Orleans.

Derbigny, J. delivered the opinion of the court. The plaintiff and appellant delivered to the defendants a quantity of coffee to be sold for his account, and he complains that they were remiss and negligent in the transaction: but he admits that they finally rendered him an account, which he accepted. The object of the present suit is to obtain the balance due to the plaintiff, on that account. On the face of it, this balance results from outstanding debts, which the defendants alledge that they have not collected.

East'n District. *March*, 1819.

RION vs. GILLY & AL.

We are of opinion, that by accepting a general account of the whole transaction, including the commission of the defendants, and in which are expressed what accounts have been, and what remains to be, collected, the plaintiff discharged the defendants—that their agency, from that moment, was at an end, and that he has, now, no right to call upon them for payment of any item, which he complains that they neglected to collect.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

Seghers for the plaintiff—*Porter* for the defendants.

PIERCE vs. *CURTIS & AL.*

If a slave, sold, remains with the vendor, he is liable to be seized for his debts.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. In this case, the plaintiff and appellant sues for the recovery of a slave, described in the petition.

The action was commenced against Curtis alone, who, at the time, had possession of the slave. Gayles, the other defendant, intervened

and claimed the slave, in his answer, as his own, suggesting fraud, in the transaction, by which the plaintiff obtained his title to the slave. Both Pierce and Gayles claim the slave, under Curtis.

The evidence, on record, shews the following facts. On the 21st of October, 1813, Curtis, by a notarial act, sold the slave in question, to Abner Stanley, and retained a mortgage for his payment. It does not appear, that the sale was attended with any tradition, but Curtis held possession of the slave, till August, 1814, when Stanley, at his instance, conveyed to Pierce, by a notarial act, all the title, which he acquired by the act of sale, in 1813.

After this, Curtis continued to possess the slave, as his own, until, some time in 1816, the sheriff of East Baton Rouge sold him, under an execution upon and against the property o Curtis, and Curtis purchased him, at the sheriff's sale.

On this statement of facts, the only question to be decided is, whether the slave sold, thus remaining with the vendor, and never having been delivered to the vendee, was or not liable to be seized and sold, to satisfy the debt of the former.

The case of *Durnford* vs. *Brooks' syndics*, 3 *Martin*, 222, 269, is relied upon, by the counsel of the defendant and appellee Gayles, and is cer-

East'n District. *March*, 1819.

PIERCE *vs.* CURTIS & AL.

tainly completely applicable to the present, except that, in the former, the things sold were merchandize, which pass by a mere verbal agreement and delivery, whereas, the dispute is now about a slave, the title to whom has been transferred by public and authentic acts. But, we are of opinion, that this circumstance cannot operate against third persons, such as creditors, so as to defeat their just claims founded on principles recognised in the above case. There is not any evidence that the slave was ever delivered to Pierce, or that the latter ever exercised any act of ownership over him, except that which is derived from extra-judicial acknowledgments of Curtis, whose interest it is to countenance the forced sale, by which he was to be benefited.

It is true that, according to our statute, the delivery of a slave, who is sold, takes place, when it is really made to the buyer, or by the mere consent of the parties, when the sale mentions, that the slave has been sold and delivered to the buyer, or when he was already in possession, under another title. *Civ. Code*, 350, *art.* 28. But this constructive delivery, does not appear from the expressions of the act of sale, and there is evidence that, that the slave remained the possession of the vendor.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

East'n District. *March*, 1819.

PIERCE vs. CURTIS & AL.

Carleton for the plaintiff—*Duncan* for the defendants.

SIERRA vs. *SLORT.*

APPEAL from the court of the first district.

This case turns on a mere question of facts.

MATHEWS, J. delivered the opinion of the court. The decision of this case, depends entirely on the credit to be given to the testimony. The district court, in weighing it, has determined in favor of the defendant, and we see no reason to alter the judgment.

It is, therefore, ordered, adjudged and decreed, that it be affirmed with costs.

Seghers for the plaintiff—*Morel* for the defendant.

Eastn District. *March*, 1819.

DAVIS vs. *PREVAL.*

DAVIS vs. PREVAL

APPEAL from the court of the parish and city of New-Orleans

An appeal from an order, submitting accounts to referees, is premature.

MARTIN, J. delivered the opinion of the court. The petition states, that Lachataigneray being indebted to the plaintiff, in the sum of $310, gave him his promissory note, and soon after died,—that the defendant took possession of the estate of the deceased, and namely of a store, which was held in partnership, between the defendant, P. A. Lay and the deceased, without making any inventory,—that the defendant has, thereby, and also, as a partner of the deceased, become liable to pay the said note. The defendant pleaded the general issue.

The parish court gave judgment, for the sum claimed, against the estate of the deceased, the costs, however, to be paid by the defendant, at all events, with his recourse against the estate, and, that the accounts of the defendant, as executor of the deceased, be submitted to reference.

From this judgment, the plaintiff appealed.

We are of opinion, that the appeal is premature: the reference occasioned some delay, but wrought no irreparable injury.

It is, therefore, ordered, adjudged and decreed, that the appeal be dismissed.

Morel for the plaintiff—*Moreau* for the defendants.

FOUQUE'S SYNDICS vs. *VIGNIAUD.*

When an act is attacked as fraudulent, parol evidence is admissible, to prove or rebut the allegation of fraud.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. delivered the opinion of the of the court. The plaintiffs complain, that the defendant detains thirteen slaves, the property of their insolvent.

The answer states, that these slaves were conveyed, by Fouque, long before his failure, to the defendant, for a valuable consideration, by a bill of sale, which bears date of the 22d of June, 1811, under the private signatures of the vendor and vendee.

There was a verdict and judgment for the defendant, and the plaintiffs appealed.

There is not any statement of facts, but the parish judge has certified, that the record contains all the evidence adduced in the case.

Mermet, examined by consent, deposed that, in June, 1811, it came to his knowledge, that

East'n District. *March*, 1819.

FOUQUE'S SYNDICS *vs.* VIGNIAUD.

Fouque wished to purchase a plantation, and the defendant unwilling to be concerned therein, proposed to Fouque a settlement of their accounts. The deponent was on good terms with both, and heard the defendant ask from Fouque, the payment of a sum of $3000, and Fouque propose the sale of twelve, or fifteen slaves, for which, the defendant offered $7000 dollars, payable, $3000 in Fouque's note, and the balance in cash. On the evening of that day, Fouque told the deponent he had concluded all his affairs, with the defendant, his son in law, and shewed him four bags of dollars, and the defendant shewed him a bill of sale for the slaves. Fouque was then in good credit.

Bideau deposed that, about the same time, he was accidentally in Fouque's store, and saw him deliver a bill of sale of fourteen slaves, to the defendant, asking him whether it had not better be done before a notary; when the defendant answered it was unnecessary. In the afternoon, he assisted the defendant in carrying $4000, which were counted in his presence, and delivered to Fouque, as the balance of the price of the slaves.

Soulie deposed, that Fouque and the defendant lived together, previous to the former's failure; that Fouque's credit began to decline, after the purchase of Harang's plantation, in January,

1812; that the deponent when he heard of this, still thought him in good circumstances, because, at the time he bargained with Harang, for the plantation, he exhibited, to the deponent, the state of his affairs, shewing property, to the amount of 60 or $70,000; that, in that state, there were a great number of negroes, for a person inhabiting the city, his house, a claim on a person in Pensacola, his goods in the store, and other property. Fouque engaged to put his slaves on the plantation and some others, thirty in all, in addition to those shewn. He knows that, about three weeks before his failure, Fouque advertised the loss of thirteen notes, of $1000 each, of the bank of Louisiana, of which the defendant was a director, and knew that no such notes were in circulation. Mrs. Vigniaud, and Fouque, her father, used to sell goods in the same store: and, at times, she bought goods for it. The defendant worked at his trade of watch maker, and kept his shop in Fouque's house. He enjoyed credit and a good character. On the 19th of August, 1812, a violent hurricane did great injury to the plantations.

Lanna deposed that, at the end of November, 1812, he sold, as syndic of an estate, indigo to the amount of 6 or $7000, that the vendee offered Fouque, as his endorser, but the creditors, being consulted, refused to accept him as such.

East'n District. *March*, 1819.

FOUQUE'S SYNDICS vs. VIGNIAUD.

Before that time, the deponent thought Fouque in good credit. He always thought the defendant in very easy circumstances, and believed him to be a partner of Fouque, from their living in the same house, and being connected by marriage.

Abat deposed, that Fouque and the defendant lived together, after the latter married the former's daughter. Fouque enjoyed good credit, till he bought Harang's plantation, it being believed that, as he had been always occupied in retailing goods, he would not understand how to conduct a plantation. From that time his credit declined.

The plaintiff introduced the records of two notaries, by which it appeared, that Fouque took authentic bills of sale of a number of slaves, purchased by him in 1811 and 1812.

A certified copy of the inventory of the property, surrendered by Fouque to his creditors, was also introduced, and one of the record of the bill of sale from Fouque to the defendant, as well as the *bilan* of Fouque and the *tableau de distribution*, and the deed from Harang to Fouque.

Cruzat deposed, that Fouque paid taxes, on ten slaves in town, in 1811, on eighty four, on the plantation, in 1812, and that in 1813, the defendant, for the first time, paid taxes on ten slaves in town.

Girod deposed, that Fouque enjoyed good credit till after the purchase of Harang's plantation—that the great price he gave for it, the high levee, and his reputed inability to conduct the negroes of a plantation, did affect his credit;—that Vigniaud has always been a hard working and frugal man—that, in 1792, at the death of his first wife, he was worth about $7000.

The bill of sale, from Fouque to the defendant, was recorded in George T. Ross's office, on the 12th of July, 1812. The signatures of the vendor and vendee were admitted.

Dubois deposed, that the bill of sale is in the hand writing of Godefroy; that the deponent arrived in New-Orleans in 1809, and saw in the newspapers Godefroy's justification; from which, he concludes that he was already dismissed from his office of a notary public—that, in the beginning of 1811, the deponent was employed, for about two months, in the office of Mr. Broutin, notary public, in which Leroux and Godefroy wrote: the latter had one fourth of the profits of the office, and remained in it, 'till he was arrested for debts and committed to prison.

Pollock deposed, that Godefroy, after he was dismissed from office, was employed by Broutin, —that his reputation was bad, it being reported that he had acted improperly in his office.

Duncan reported that Godefroy's character

East'n District. *March*, 1819.

FOUQUE'S SYNDICS *vs.* VIGNIAUD.

was bad. He had been charged with forging the will of an American, who could not speak one word of French.

It does not appear, to this court, that the judgment, in the present case is incorrect. The negroes were purchased, according to the bill of sale, on the 22d of June, 1811: from that instrument, it appears that they were already in the possession of the vendee, and, both the parties to the sale being in the same house, and their families making but one, it is not extraordinary that the slaves were not removed. It does not appear that, at this period, there was any creditor of the vendor, who might be defrauded, and both parties are sworn to have been then in very easy circomstances. About six months after, January 7, 1812, Fouque purchased the plantation, which appears to have been the cause of his subsequent discomfiture, and about six months after this purchase, July 11, 1812, the defendant caused this bill of sale to be recorded, and about two months after, a violent hurricane laid the plantation waste. This disaster entirely destroying the credit of Fouque, which began to decline from the date of his purchase, he was afterwards compelled to surrender his property for the benefit of his creditors.

The plaintiffs' counsel contends, that the testi-

mony of Mermet and that of Bidaut, ought not to be noticed, because they testify to facts, which happened at the time of making the bill of sale. It is true, the law forbids the introduction of parol evidence "against or beyond, what is contained in the acts, or on what may have been said before or at the time of making the acts or since." We understand this to mean that any thing, which may have been said to contradict, take from or add to the stipulations of an act, shall not be heard: but when an act is attacked as fraudulent, or false, parol evidence must, of necessity, be admitted on the part ot the defendants, not, indeed, to alter or modify the contents, but to support the truth of the act and the good faith of the parties. Here, the testimony, so far from going against or beyond the act, has no other object than to corroborate it. The rule then, invoked by the plaintiffs' counsel, receives no application here.

But, independently of this, the witnesses here examined swear not to what they heard *said*, but what they saw *done*. One of them *saw* $4000 of the consideration money, counted and paid.

The counsel further urges, that the bill of sale was not *acknowledged*, but registered, without any proof or acknowledgment of the signatures, at the request or of either of the parties, but of Godefroy, the person who wrote it.

The law provides that acts, under private sig-

East'n District. *March*, 1819.

FOUQUE'S SYNDICS *vs.* VIGNIAUD.

natures, for the sale of slaves, not registered, within the legal time, shall have effect against third persons, only from the time of their being registered. We are of opinion, that as, in the present case, the bill of sale is admitted by the plaintiffs, to be the act and deed of the vendor, the want of an acknowledgment, previous to the registry, if it could avail them, in any case, cannot be opposed by them in this.

There is nothing in evidence, from which a suspicion of fraud can arise against the defendant; nothing from which it may be concluded that the vendor meant to cover his property, or even that he had any creditor that might be defrauded. Neither his subsequent ill conduct, nor the ill fame of the person employed to write or to procure the registry of the bill of sale, can affect the title of his vendee.

There is not any thing, in the circumstance of the defendant not paying taxes on the slaves, till 1813: he bought them in 1811, the taxes of that year, were probably paid by the vendor; those of 1812, were a charge on the vendee, and we all know that, according to the mode of collecting taxes, those of 1812 were not payable till 1813.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

Seghers for the plaintiffs—*Livingston* for the defendant.

East'n District. *March*, 1819.

Fourgue's syndics vs. Vignaud.

WILLIAMSON & AL. vs. *THEIR CREDITORS.*

In this case, the defendants obtained a rehearing. 5 *Martin*, 618.

After the filing of the tableau of distribution by the syndics of the creditors of an insolvent, a notice to all the creditors, is an indispensible formality, which the syndics cannot wave.

Livingston, for the defendants. The judgment appealed from, was made on a rule, obtained by a judgment creditor of the insolvent, directing the defendants, syndics of Williamson and Patton, to shew cause, why they should not do three things.

1. Rescind the mortgage in favor of the plaintiffs (the assignees of W. P. Meeker.)

2. Convey the mortgaged property to Stephen Henderson.

3. Pay the proceeds of the said house, as well as of the Alabama lands to the plaintiffs.

This rule was obtained on the 6th day of May, 1818, and was returnable the 9th—it was served the 8th, giving one day's notice of the requisition, by which the syndics were called on to part with all the funds of the estate in favor of one creditor, to the prejudice of the rest, and it was made absolute without any notice whatever to the

East'n District. *March*, 1819.

WILLIAMSON & AL. vs. THEIR CREDITORS.

other creditors, without enquiring into the nature or rank of their claims or privileges, without the usual publication for them to come in and shew cause, which (it is asserted) was never yet dispensed with, and, what is worse than all, without enquiring into the truth of an allegation that the plaintiffs' demand of a preference was founded on a judgment, not only in itself null, but fraudulent from the circumstances attending it.

It will be necessary to take a view of the facts, as they appear upon the record.

On the 28th of April, 1818, the syndics, pursuant to an order for that purpose, filed an account of the estate, by which it appeared, that there was a ballance of not quite $1000 in their hands, and that there were demands upon them, which they deemed priviledged, to more than that amount; for which reason they conceived that, as there was nothing to distribute, a tableau of distribution could not legally be demanded. The present claimants, however, insisting on its being produced, the court made an order for that purpose, and four days after, a tableau was filed, in which the sum of $919 74, the ballance in hand, is divided between the creditors *pro rata*, but, at the same time, it is repeated that that sum is not sufficient to pay the charges for professional services.

At the close of this tableau, the syndics observe that *they submit the propriety of the creditors being notified to prove their debts, that the dividend may be made with accuracy.* This course was the one which not only justice but daily practice required, instead of that, four days after filing the tableau, a rule was taken to shew cause why the whole proceeds of the estate should not be paid to a single creditor. The substance of that rule has been stated. On the day of its return, the counsel for the syndics found themselves obliged, at one day's notice, not only to answer, but to go to trial: a trial of immense importance, both as to principle and amount. The answer, therefore, was hasty and made at the bar, but in substance, it is sufficient. It states:

That they do not think themselves authorised to cancel the mortgage, and they argued on this point; that the provision of the act (which was the only authority relied on in the court below) did not extend to cases of insolvency prior to its passing, but that, at any rate, as the plaintiffs in the action were the obligees in that mortgage, they could immediately cancel the mortgage, without any act of the syndics.

2. They express their willingness to convey the property and to receive and distribute the

East'n District. *March*, 1819.

WILLIAMSON & AL. vs. THEIR CREDITORS.

money according to law, as soon as the incumbrance should be removed.

3. They say that the plaintiffs ought not to receive it, because they say, first, that the judgment, under which they claim, is *null*,—secondly, that it does not give the plaintiffs any right to be paid the amount thereof, in preference to the other creditors.

Obliged to go to trial, *eo instante*, we offered (I quote the words of the bill of exceptions) to go into evidence to prove that the judgment, upon which the said William P. Meeker's assignees claim, was *null* and *collusive* and *fraudulent* against the creditors; this the court refused to admit, under an allegation that these facts were not put in *issue by the rule.* But as nothing was put in issue by the rule, I suppose the meaning is that they were not put in issue by the cause shewn —Now let us enquire into this. Presuming, however, that if we are precluded from this important enquiry of *fraud* in a question of bankruptcy, if we are precluded, I say, in this case, it must be by a stricter adherence to the niceties of pleading, than ever yet was known in our courts, and that if it be adopted as to our *cause shewn* in writing, it is but fair, one would think, to apply it to the foundation of this proceeding. The rule of the 6th of May, if the *cause shewn* is to have all the certainty and finish of a plea, the rule ought to have all those required in a petition—

and the court must stop (as they do in deciding on a demurrer) at the first fault in pleading; even if it should have been committed by the party complaining of irregularity.

Now, unfortunately for the plaintiff who requires such nicety from us, it happens, that his rule assigns no one reason why the whole of this estate should be paid to him, except that a judgment in his favor was read, without saying against whom it was rendered, or alledged when it was registered, or giving any reason why this sum should be paid to him, in preference. The time of enregistering is not shewn at all, and yet it is on this only the preference is founded, and I might safely claim the decision of the court, on this defect alone in the plaintiffs' case. But I need not rely on it.

Our return to the rule says that the judgment is *null*, and we offered (as is shewn by the bill of exceptions) to go into evidence to prove that it was so. This court seems to think that, that evidence was something extrinsic of the record: but how does that appear? Evidence is a general term, the record itself would be evidence of its nullity, in some respects, and that was, in fact, the evidence on which we intended to rely, but the court would not permit it to be introduced. Surely, when I alledge a fact and offer, generally, *evidence* to prove it, the court will not *pre-*

East'n District. *March*, 1819.

WILLIAMSON & AL. *vs.* THEIR CREDITORS.

sume that the evidence I offered was such as was not admissible; therefore, the judgment must be set aside, for the court, without inquiry whether my evidence was legal or illegal, would not suffer me to produce it under an allegation that it was not put in issue by the rule, when, in fact, it is expressly alledged in the return, and, *in truth*, was offered to be proved by that very species of evidence which the court thinks was the only admissible testimony, the *record itself.*

But is this the only admissible testimony to prove an act void or null? I think most assuredly not. Fraud and collusion will vitiate a judicial as well as a conventional mortgage. In this very cause, this court has set aside a sale, made of the very property in question, under this identical judgment, that is to say, they have declared it *void*, yet in itself, it was as solemn an act as the judgment, it was a notarial act, clothed with all the forms of the law; they declared it void, because they listened to testimony, which shewed that it was intended to give an undue preference to these above the other creditors. Now, if we can shew the same thing as to their judgment, does not justice to the creditors require that it should be done, ought we not to be allowed to do it, and will not the greatest injustice be done if we are precluded? Are not our offered *probata* in exact agreement with our *allegata*. We al-

ledge that the judgment is *null* and that it gives to the plaintiffs no right to be paid in preference to the other creditors.—And we offer to prove, that it is *collusive and fraudulent.* Let it be remembered too that this is not a regular action in which formality might be required, but a summary proceeding in which what we offered to prove and which is reduced to writing in the bill of exceptions, ought perhaps to have equal weight, that is to say that we might have shewn cause ore tenus, and supported our allegation by proofs. That is supposing the course pursued by the plaintiff to be the proper one, which I think I can demonstrate it was not.

This is a case of *cessio bonorum*, occurring in the year 1811, consequently to be determined by the Spanish law, because the law on that subject, passed the 3d of July, 1805, was repealed by the insolvent law of 25th March, 1808, which itself only related to cases of actual imprisonment, and the only other law of the state on the *cessio bonorum*, did not pass until the 20th of February, 1817.

The author, quoted by the court, is one of the best guides we can follow in the course of proceeding to complete the *cessio bonorum* or *concurso* of creditors. On this branch of it, the mode of setling the rank of the different creditors, he tells us, that after the administrator (syndic) is chosen, each creditor in turn takes the

East'n District. *March*, 1819.

WILLIAMSON & AL. vs. THEIR CREDITORS.

autos, and states his pretensions to a preference which being communicated to all the rest, each one may contest the claim and assert his own, if he have any, to be paid by priority. The judge then takes the proceedings, gives a term for each one to prove his allegation and settles the rank of the respective claims, by a definitive sentence, which however may be appealed from. 2, *Febrero*, *Librer. escr.* No. 29 and 32. Here we find that each individual creditor is a plaintiff and defendant against the others, *todos son actores y reos.* The syndic does not represent them here, because their interest is not joint and the syndic can only act for all. From the nature of things, therefore the joint agent of the whole cannot be consistently with his duty, the sole actor in the contestation, that arises between the individual creditors. It may be supposed that by contesting all claims for preference, he promotes the interest of the mass of creditors against that of the claimant—but first, as I shall shew, this is not part of his office or duty, nor is he the person to do it, and secondly this would impose on him the obligation of contesting all claims, just or unjust; or of using his discretion to admit them, and thereby rendering himself the judge, what preferences should be given, without consulting the parties really interested.

It may be objected that this mode of proceed-

ing, laid down by *Febrero*, is inconsistent with our mode of practice, and cannot be carried into execution. I acknowledge that strictly it cannot, but we have adopted a course of proceeding which is analogous. Instead of communicating the *autos*, and suffering each creditor to make a separate *incidente* of his demand, as was done by the Spanish tribunals, our courts established the practice of first filing the *tableau of repartition* made by the syndic, from the best materials in his power, in which he classes the creditors, in the manner he deems agreeable to law. On the filing of this tableau an order is made directing all persons entrusted to shew cause in ten days, why the tableau, should not be confirmed, and the distribution made accordingly: this order is directed to be published—and on its expiration, if any creditor finds himself aggrieved either by not receiving the preference which he thinks himself entitled to, or (if he have none himself) by another being preferred who has no such right he may seek relief, but that must be *by suit*. The judge cannot without violating all law, dispose of questions of this magnitude and legal importance in a summary way on motion, without giving any notice, and here no notice whatever *was given* to the *creditors*, many of whom may have higher priviledges than the plaintiff. The proceeding also must be reciprocal, if the creditor can

East'n District. *March*, 1819.

WILLIAMSON & AL. VS. THEIR CREDITORS.

force the syndics to trial on the return day of the rule, as was done in the present case, the syndics have an equal right and then the creditor may be forced to trial, the same moment he has notice of the defence, which would be not less unjust. Besides as these objections turn generally on allegations of fraud, and those questions are peculiarly the province of the jury to resolve, it seems not only illegal but unjust to adopt such a course of proceeding, as must deprive the party of this benefit.—The practice has never been either under the Spanish laws, or since the institution of our courts, to settle the question of priority of credits in a summary way, by motion: in all cases within my knowledge, where the syndics have refused to allow a preference, the creditor has been put to his suit.—Those suits have been received by the district courts and many of them have passed by appeal through this. Among many others, I might have mentioned *Brown* vs. *the syndics of Philips*, *Rousselle* vs. *syndics of Dukeylus*.

Now, the question arising in those cases was precisely that presented in the one now before the court, a preference claimed by mortgage and an allegation of fraud against the creditors; yet, he course of proceeding was diametrically opposite: both cannot be right, and which will the court support? That one which has been con-

firmed by practice, which is agreeable to the spirit of the Spanish law, which still governs us? That which gives the usual time for preparation, which secures the trial by jury, at the election of the party; or that which is contrary to the usual course of proceeding, which is at direct variance with the principles of the ancient law, which gives no time for preparation, hurries the parties at a day's notice into the investigation of most important questions of fact, and the most intricate discussions of law, destroys the right of election to be tried by a jury, and decides on the rights of creditors, without giving them the slightest notice that those rights are drawn in question. I cannot doubt of the question.

I have said that the course pursued in this case, decided on the rights of the individual creditors without giving them notice; in effect, what notice has any one of the creditors had of this claim, which is to take away the whole estate? The syndics have, indeed, had the species of notice that I have mentioned; but suppose some of the other creditors to have privileges or prior mortgages, what opportunity has such creditor had of shewing his right, or of contesting that of Meeker's assignees? No publication has been made, and three days after the tableau was filed, we were ordered to pay the whole proceeds to one creditor; if we had complied with that order, I

East'n District. *March*, 1819.

WILLIAMSON & AL. *vs.* THEIR CREDITORS.

ask what opportunity any one creditor (whatever might have been his rights or privileges) would have had of even knowing how he was classed? No notice, I repeat, was given to him, and before he could seek relief, before he could even know he was injured, the whole sum would be paid to the assignees of a British bankrupt, and immediately put without his reach. I ask, and I ask it most seriously and earnestly, but most respectfully, whether this court will sanction a course of practice that leads to such consequences, from which, I may say, such abuses are inseparable, not to mention, the obvious one of favoritism and collusion between the assignees and a particular creditor. They make out their tableau, classing a favorite creditor in the highest rank, to the full amount of their funds, without giving, any public notice of the existence of this account: the favored creditor obtains a rule similar to the one which was taken in the present case, the syndics either are silent, or make a sham defence; the rule is made absolute, and the funds are carried out of the reach of the creditors, before they have the slightest idea of the contest, and although they could have shewn that the security had been fraudulently obtained, or that their own was entitled to a preference. This danger also will not be lessened, when we reflect that syndics are always them-

selves creditors; and that if they are admitted as competent parties, in questions between the creditors individually, as to their rank, that their own will never be lost.

Those reasons operated, I presume, for they are obvious, with the Spanish legislators, and they have accordingly excluded the syndics from the settlement of the respective rank of the creditors, as appears not only generally in the passages I have referred to in *Febrero*, page 31, 2 *Lib. de Escribanos*, when he says, the syndic has no power "mesclarse en disputarles la calidad, legitimidad, y prelacion de sus creditos." This is the rule by which this case must be governed, except so far as it may be found to interfere with our system of practice, established by the act of the territory or the rules of practice made under it. What that change is, I have already pointed out, and I have shewn that the practice of the late superior court, though it did not formally exclude the agency of the syndics, in questions of preference, yet always required notice to be given to the individual creditors to assert their rights, which was not done in the present instance, and I have also shewn that none of the insolvent laws of the territory or the state, made any regulation on this subject, except the act of 1817, made long subsequent to the failure in question. But if the court will permit, and the

East'n District. *March*, 1819.

WILLIAMSON & AL. *vs.* THEIR CREDITORS.

plaintiffs should persevere in chusing that law as the rule of our conduct, I have no objection. By the 35th section of that act, the practice adopted by the supreme court is confirmed, Notice is directed to be given *to the creditors* by bills or publications, in the same manner as for a meeting, of the filing of the tableau, and that they shew cause why it should not be confirmed.

The 36th section, also, confirms the practice I have stated to have been that of our courts, by directing that the *creditors* (not the *syndics*) shall file their opposition, if any they have in the clerk's office, "and the said opposition shall be decided upon in the manner prescribed by law." What is the manner prescribed by law? As there is no particular law on this subject, these words must mean in the manner prescribed for all other suits. That is, in the manner we contend it ought to have been done, in the present instance.

Thus then, whether we recur to the Spanish law, the practice of our courts, or the statutes of the state, we find the proceedings equally irregular and illegal.

Should it occur to the court, that I am objecting to irregularities which ought to have been assigned as errors. I have a satisfactory answer.

The rule made by this court, declaring that errors shall be assigned within a certain period

after filing the record, or that no advantage shall be taken of them, could only have been founded on the idea that the party should be deemed to have waved all *defects of form* which he did not point out in the beginning of the suit, and that he should not be permitted to avail himself of the want of a form, which he had implied waved any more than if it had been expressly done. Independently of this consideration, the rule would have been unjust and of course would not have been adopted, because it is the duty of a judge to decide *according to law*, this duty he swears to perform. How then can he confirm an illegal judgment, or one not given according to the forms prescribed by law, whether the defect occur *to him*, or be pointed out by the parties, unless in cases when the parties make a new law for themselves by either expressly or impliedly agreeing to wave the defect?

But, in cases where this implication of consent cannot be made, either because the injustice that must be done to the party in so manifest as to preclude the idea that he *did consent*. Or where the irregularity, if admitted, would so far injure third persons as to shew that he *could not* consent to their prejudice. In both these cases the reason of the rule ceasing, the rule cannot be in force—surely this, nor no other court can tie up their own hands so as to prevent their

East'n District. *March*, 1819.

WILLIAMSON & AL. vs. THEIR CREDITORS.

doing justice. No rule can oblige this court, sitting to correct the errors of inferior courts, to confirm a judgment which is manifestly contrary to justice and law. This reasoning is, I think, conclusive, as it applies even to the parties to the suit, but when the affirmance of the erroneous decree would operate, not only on the party who might not have been diligent in his own defence, but must irreparably injure others guilty of no laches, I will not offend the court by supposing, for a moment, they could hesitate in reversing the judgment if they found the proceedings erroneous.

We accordingly find, that all courts, and particularly those of equity, in the last stages of a cause, even on the hearing, and the house of lords, even on an appeal, frequently dismiss the bill for want of proper parties, although no exception of that kind was taken by either of the parties, and the rules of pleading are infinitely more strict in England than they ever were here. But, if the assignees of Meeker will have strict practice, let them point out to the court the part of the record which contains the evidence of their prior claim. Where is their judgment? What is the date of its registry? Why is not the record made a part of the evidence? It is true, the syndics, in their account and in their return to the rule, speak of a judgment, but always

coupled with a declaration that it is null and that it gives no preference to the claimants. If their confession be relied on, that confession must be taken altogether. Will they rely on the preamble to their rule of the 6th of May, which says, "on reading a judgment obtained by the assignees of Wm. Meeker [without saying against whom] ? This surely cannot avail them, first, because it was not evidence on the trial, but only a ground for granting the rule. Secondly, because the judgment ought to have been produced at the trial and this court could then have judged of the nullities apparent on its face, even if they thought the court below right in refusing to let us shew it to be fraudulent, which I cannot suppose.

I have, I trust, shewn in a very irregular manner, that which, if reduced to order, might be arranged under the following head.

I. That the mode of proceeding adopted by the plaintiff is totally illegal and irregular. I have proved this by shewing,

1. That this is a case arising under the Spanish law of the *cessio bonorum*.

2. That by this law the administrator or syndic has no right to appear as a party in the settlement of the rank of the individual creditors, but that each creditor carried on a separate suit or *incidente* for that purpose and produced his own

East'n District. *March*, 1819.

WILLIAMSON & AL. vs. THEIR CREDITORS.

proof, and when this was done the judge settled the rank of the creditors by a sentence from which an appeal lay.

3. That after our practice would not admit of the delivery or *traslado* of the *autos*, our court had adopted the analagous proceeding of calling on the individual creditors, by a summons and an advertisement, to see that they were placed where they ought on the tableau, and to contest the claims of others.

4. That none of these requisites were performed in the present case, that the *creditors* have had *no notice*: that a three day rule only was given on the *syndics*, that it was in *effect* only the notice of a single day: that they were required to answer and try the cause at the same instant, and that the rights of the individual creditors have been decided on, without hearing them or even informing them that such a decision was to take place.

5. That, if our local laws on the subject, though made subsequent to the failure, should be deemed the proper rule to govern it, yet those are analogous to, and confirm the previous practice of the court.

II. I have endeavoured to demonstrate that, if the court find the proceeding erroneous, they are under an obligation to reverse the judgment, al-

though no errors have been specially assigned before:

1. Because it is not a case in which a waver of errors can be implied.

2. Because, if it were, such waver will not be permitted, where it would irreparably injure third persons.

III. I have tried to convince the court that independently of any defect, in the course of proceeding, manifest injustice has been done by refusing to let the syndics shew the nullity of the judgment.—I have argued on this head.

1. That in a summary proceeding, like the one adopted on this occasion, nicety of pleading cannot take place; that, in such proceedings, either the cause is to be heard on the return day, or it is not—if according to such proceeding, the cause is to be heard on that day, then any enlargement of the *probata*, beyond the *allegata* in the return, is of no consequence: because the *allegata* are only intended to give the opposite party notice of what is intended to be relied on, that he may come prepared to contradict it; but it is obvious that this can be of no consequence to him, where the allegation and the proof are to be made at the same moment.

If, on the other, the course of proceeding is not

East'n District. *March*, 1819.

WILLIAMSON & AL. vs. THEIR CREDITORS.

to press the trial on the same day, then the whole was irregular.

2. That, on the return of a rule to shew cause, why a certain act should not be done, the court are bound to listen to every legal allegation, whether it be made in writing or verbally by an offer to produce proof—that there is no rule of court, nor any law requiring such return to be in writing and most certainly, no such rule or law binding the party strictly to the words of such return—or obliging him to set forth particularly in writing the time, place and circumstances which he would be obliged to do in pleading, so as to prevent his amplifying by proof the general assertion in the return That, even if this should be required, there is nothing to prevent the party from shewing two causes, provided they be not inconsistent and are both made on the return day. Here the party has not only stated in the return that the judgment was *null*, and that it *gave no preference to the party*, but he has also in writing stated, that he would prove the judgment to be *fraudulent and collusive*: this he put in *writing* on the return day of the rule, *sedente curia*, and the judge has written, at the bottom of this offer and allegation, that he would not examine the proof.

I have endeavoured to shew, that to confirm this refusal would operate the most flagrant in-

justice and forever stifle an enquiry which the interest of all the creditors requires.

3. I have respectfully suggested that the court have misconceived the facts of the case, when they think that the syndics did not offer to prove the nullity of the record by the record itself—I have shewn that the word *evidence* is general and includes all species of evidence, and that, when the bill of exceptions states that we offered to introduce evidence to prove the nullity of the judgment, the nullities arising from the face of the record were actually, in point of fact, among those to which we wished to draw the attention of the court.—This derives additional strength from the words of the return: they offered to prove it—*null*, and collusive and fraudulent.

4. Under this general head, I have also argued that the general allegation of nullity contained in the return, was sufficient to allow the introduction of the proof of collusion and fraud, for the reasons there alledged, and on which I shall take the liberty to enlarge a little here.

This is the case of one creditor seeking to establish a preference over the others; he calls on the syndics first, to render an account of the estate for a distribution, which they do, but accompany it with a request that the creditors may be individually called to ascertain their rights:

East'n District. *March.* 1819.

WILLIAMSON & AL. VS. THEIR CREDITORS.

he next calls on the syndics to shew cause, among other things, why the proceeds of a house and land forming the whole fund, should not be paid to him. To this they answer, that the judgment, under which he claims the priviledge, is "*null*," and (in another part of the return) that it gives him no right to be paid in preference to the other creditors: here then are two separate allegations, one of nullity, the other, that it gives no preference, and to support these, the syndics offered evidence to prove that the judgment was *null* and *collusive* and *fraudulent*. This certainly was not going beyond what was alledged: collusion and fraud render a judgment null, and most clearly shew that the creditor, according to the words of the return, *was entitled to no preference under it*. But (the court say) a judgment may be null in several ways; it may be null from *bribery* and *fraud*, or other extrinsic matter: therefore the party has no notice by a general allegation of nullity, upon what he means to rely, who alledges it; this is most certainly true, but with all the respect which I owe and and feel for the opinions of the court, I would ask, whether this would not rather be a ground of exception to the answer, than of objection to the proof, after the answer is received. I alledge nullity generally, the opposite party would have had a right, *perhaps*, to have except-

ed to my answer, and have asked me to specify what species of nullity; but if he receives the answer and goes to trial on it, he cannot object to any species of nullity I may attempt to shew, because, if he can object to any one, he may object to all, one after the other, and thus the party, alledging nullity, would not be permitted to shew it. Take a similar case from the jurisprudence of a country, whose nicety of special pleading is *proverbial*. By the laws of England, as well as by ours, fraud vitiates all contracts and judgments. There are certainly as many species of frauds as there are causes of nullity. therefore the general allegation of fraud gives no more information to the opposite party of the facts that will be relied on, than the allegation of nullity. Yet, if in England a contract or judgment is relied on, in pleading, the party wishing to get rid of it by shewing it fraudulent, has only to alledge *per fraudem*, that being the general replication.

And, even in the present case, if I understood the court aright, they seem to think that if the syndics had alledged that the judgment was fraudulent, it would have been sufficient; yet what additional information would that have given the party? By bribery? By suborning witnesses? By forging papers? By secreting them? Or in which of the twenty thousand shapes in

East'n District. *March*, 1819.

WILLIAMSON & AL. vs. THEIR CREDITORS.

which fraud can appear? If, therefore, a general allegation of fraud be good, a general allegation of nullity must be equally so: for the one gives no more information to the opposite party than the other.

Suppose the plaintiff should sue as assignee of a promissory note, or any other instrument, and the defendant, generally, denies the allegations of the petition, would he not be allowed, under this plea, to shew that it was a forgery? Undoubtedly he would—and yet the plaintiff, who was a mere endorser, and knew nothing of the making of the note, might be totally unprepared for such a defence; yet it is an inconvenience under which he must labor, because every person who relies on an act, must come prepared to support it in all its essential parts. Now, the *good faith*, with which an act is made, is of its very essence, and therefore, wherever the act is drawn in question, all the parties, relying on it, must be prepared to prove that it was honestly made.

Will the court pardon me one single reflection on this subject, that our practice is founded on principles of the utmost simplicity; that our courts have hitherto discouraged every attempt towards the introduction of that spirit which has introduced the curious science of special pleading into England, where the practice, now a labyrinth of perplexity, was once as simple as ours,

and that we need go no further than the present case for an example of its mischiefs, if the omission of a single word, in a pleading by syndics, should take, from creditors totally ignorant of the proceeding, the whole estate of their debtor, and give it to persons not entitled to a farthing.

IV. I have contended that the record contains no evidence whatever, that the assignees of Meeker are entitled to a preference.

Because, the mention of their judgment, in the syndics' account and return contains an assertion of its nullity, and if their confession be relied on, the whole must be taken together.

Because the statement contained in the preamble to the rule to shew cause, of the 6th of May, cannot be considered as proof, and if it could, does not set forth the necessary parties nor dates.

Smith, for the plaintiffs. On the 27th of July, 1811, the assignees of William P. Meeker recovered judgment in the late superior court of the territory of Orleans (after three years' litigation) against the firm of Meeker, Williamson and Patton for $ 40,711 92 debt, and $ 85 25 costs. In February of the next year (1812) Williamson and Patton, two of the firm of Meeker, Williamson and Patton (which had expired by its own limitation on the 1st of January, 1812)

East'n District. *March*, 1819.

WILLIAMSON & AL. *vs.* THEIR CREDITORS.

petitioned for a meeting of their creditors and filed a schedule of their affairs, and also of the affairs of the said late firm of Meeker, Williamson and Patton; (of which firm the *senior* partner, *Samuel* Meeker, resided in Philadelphia) in which schedule the house and lot in question are exhibited (as in truth they had been) as part of the partnership stock of Meeker, Williamson and Patton, the judgement debtors of the plaintiffs, and in which also the plaintiffs (represented by E. Jones, their agent) are exhibited as creditors for forty odd thousand dollars.—The plaintiffs, through their agent E. Jones, appeared at the meeting of the creditors, claiming the house and lot, under sale, and made oath to the balance of their judgment debt. Here may be added, as it made part of the oath of debt of the plaintiffs, at the said meeting, though not necessary to the present decision, that the plaintiffs as aforesaid, made oath to a further debt of upwards of $70,000, under assignments from the said senior partner, *Samuel* Meeker, of Philadelphia, of balances of several years profit due him from the other members of the firm of Meeker, Williamson and Patton. *No other priviledged debt*, than that of the plaintiffs, is exhibited on *either schedule* or by the *oath of any creditor*. The sale of the house and lot (on a suit brought by the plaintiffs to recove possession) was after-

wards decreed to be rescinded, as having been made too short a time (January, 1812) before the insolvency of Williamson and Patton. From the date of the failure of Williamson and Patton in February, 1812, until the month of March, 1818, that is upwards of five years, the estate has remained unliquidated, and no step has been taken by the syndics to disencumber, or dispose of, that part of the estate affected by the plaintiffs' judgment, nor had they objected in any form to the validity of that judgment. On the third of March last, then the plaintiffs presuming the estate to be liquidated, ruled the syndics to file their tableau and exhibit their bank book. On the 28th of April they (the syndics) exhibited an account by which, in the *body* of it, they shew a balance of $ 2909 17 (but shew in the *margin* a further sum of $ 2500, product of the Alabama lands, and also a house and lot in St. Louis st. worth $18,000) they add, in the body of their account, as a reason for having made no tableau, that they have promised to their counsel, over and *above* what they have paid him, $1250 more, "*to be paid as may be required in the progress of legal discussion*," and which they hold themselves authorised to retain as a priviledged debt. They add, as another difficulty, "in the way of apportioning any balance they might have," an outstanding demand of *Samuel* Meeker (the *se-*

East'n District. *March*, 1819.

WILLIAMSON & AL *vs.* THEIR CREDITORS.

nior partner of Meeker, Williamson and Patton, above mentioned) of upwards of $50,000 ! (probably alluding to the assignments above mentioned, for which suits had been brought by the plaintiffs themselves before the failure.) On the 2d of May, they produced what is called a tableau, by which, after deducting all their expenses, and their commissions on the whole amount of property in their hands, from the above mentioned sum of $2909 17, mentioned in the *body* of their account, as the amount of funds, they draw the balance of $938,06 and then bring themselves in debt, by their promised counsel fees $311,94. But add, if they must make a tableau, that "one cent in the dollar," according to the decimal operation, which they make on a sum of $91,974 4 which they take from the schedule, "will give $919,74," leaving (they add) "the small surplus of $18 32 to go towards the next dividend."—They, however, "submit to the court, the propriety of the creditors being notified, to prove their debts, that the dividend" (of this cent in the dollar) "may be made with *accuracy* !" Notwithstanding the singular character of this exhibition before a court of justice, two things clearly appeared from it, and enough for the plaintiffs in this cause, 1st, that there was *no other priviledged debt* against the estate than the plaintiffs' judgment, except costs and expenses of justice,

for which there was an exhibition of ample funds, to wit, not only of the sum acknowledged in the body of their account of $2909 7, but also the $2500, product of the Alabama lands—making together $5409 17, much more than enough to cover that object, on the largest estimate, and supposing it to exceed in its relative proportion all former experience. 2d. That they had not made sale of the house and lot affected by the plaintiffs' judgment, towards satisfaction of it, nor had they even raised the mortgage created by the judgment, nor taken any other step towards effecting that object. Nor had they commenced any judicial proceeding to annul the judgment, as was their obvious duty, if they intended to question its validity. Enough now being before the court to shew, not only the existence of this priviledged debt, in favor of the plaintiffs, and that no step had been taken to effect its payment or annul its force, but also, that there existed no presumptive objection to its satisfaction, out of the proceeds of that part of the estate subject to its priviledge ;—on the 6th of May, on motion in behalf of the plaintiffs, "on reading the several returns made by the syndics, as well as the judgment rendered in the late superior court on the 27th of July, 1811, at the suit of Joseph Peel and others, assignees of Wm. P. Meeker, for the sum of $40,711 92 to-

East'n District. *March*, 1819.

WILLIAMSON & AL. vs. THEIR CREDITORS.

gether with the further sum of $85 25 costs, it was ordered that the syndics of the creditors of Williamson and Patton shew cause on Saturday next, the 9th day of the present month of May, why they should not rescind what they term the pretended mortgage in favor of the assignees aforesaid, and why the said syndics do not make sale of the said mortgaged premises to Stephen Henderson, the purchaser thereof, and pay over the proceeds thereof, to the above named assignees."

On the 9th of May, the syndics file a written answer, and therein, for cause, alledge "that they have *no power to rescind the mortgage* on the property sold to the said Stephen Henderson, as they are advised and believe, and that *when the said mortgage shall be legally cancelled, by the persons who claim under it*, they are ready to convey the property, &c." and after some immaterial allegations, add "And these respondents say, that *the judgment*, on which the assignees claim to receive the proceeds of the said house and lot, and the said lands, *is null*, and they further say, that the said judgment *does not give*, to the said assignees, *any right to be paid* the amount thereof, *as a priviledged debt*, in preference to the other creditors of the said bankrupts." Upon the issue presented by the foregoing rule, with the written return of the syndics in answer

thereto, the case came on for hearing, and it was finally decided by the court, that the cause shewn being insufficient, the rule be made absolute, and that the syndics, within ten days, make the sale to Henderson, raise the incumbrances on the house and lot, and deliver over the proceeds to the plaintiffs, the judgment creditors. In the course of the hearing, the syndics, through their counsel, desired time to *go into evidence* to shew that the judgment was fraudulent and collusive, as well as null; of which however, in the words of the judge, no proof was produced:" right leave to go into evidence (or, properly speaking, further time to seek witnesses) to prove fraud and collusion, was not given, because the matter had not been put in issue between the parties. To which decision they excepted. Upon these facts, the following questions naturally arise:—Have the plaintiffs pursued the right course, to obtain payment of their priviledged debt? And if the first question be answered in the affirmative, then have the defendants raised any solid objection to their success?

The plaintiffs are judgment creditors. At the end of six years after the failure, they heard nothing of payment or any steps taken to effect it, or to shew that it is not due: On the compliance of the syndics with the order of the court, to

East'n District. *March*, 1819.

WILLIAMSON & AL. vs. THEIR CREDITORS.

shew what has been done with the estate, it appears, from an *inspection of their tableau*, that there exists *no other priviledged debt* against the estate, except the new costs and expenses of justice, for the payment of which, more than sufficient funds are exhibited, over and above the property affected by the plaintiffs' judgment. It appeared further, that the syndics had, in truth, not liquidated the property bound by the judgment; and, though obliged to notice its existence, as a matter of record for so long a time, no step had been taken by them to effect its payment or annul its force. The plaintiffs then proceed directly to the point of forcing a settlement, by taking a rule in the character of judgment creditors, (naming therein the sum, the date, the parties and the court) for the syndics to shew cause, why they should not sell the property, bound by the judgment, and apply the proceeds towards its satisfaction. Here a direct opportunity was afforded of pleading and objecting every thing that could be urged against the demand, and accordingly this rule, with their answer, presents the questions, the court is called on to decide. Was any new step necessary on the part of the plaintiffs, judgment creditors, to establish their *right*—to make *known* and *certain* their demand against the estate? Could any thing be more certain and final in its own nature,

than a final judgment of a court *without appeal?* And, but for the stay of all proceedings against the insolvents, as to person or property on their failure, would not the plaintiffs have been entitled to an execution against both, as a matter of course? Will it be pretended, that they ought to have resorted to an action of debt on the judgment? This would be deemed a vexatious and odious proceeding; as tending unnecessarily to accumulate costs. Even in England by 43 Geo. III. (*Tidd*, 879) the plaintiff, in an action of debt on a judgment, is deprived of costs. How much stronger, in this country, is the objection of expense to such a proceeding as an action of debt on a judgment, and against an insolvent's estate. But as the court are satisfied on the point of the regularity of proceeding by rule, without the form, expence of petition, and citation, we will confine ourselves to a rapid glance at the further objections of the defendants' counsel, and dwell somewhat on that one which seemed most to attract the attention of the court. With the objection to the mode of proceeding, falls the objection of surprise. By the facts that have been stated, it appears that, from the first moment of the insolvency, they must have been apprised of the existence of the plaintiffs' priviledged debt, not merely from the records of this court, and of the office of the recorder of mortgages, where ac-

East'n District. *March*, 1819.

WILLIAMSON & AL. vs. THEIR CREDITORS.

cording to the defendants' own shewing it existed, as an insuperable obstacle to the sale of the property affected by it, but also from the declaration, under oath, of the agent of the plaintiffs, at the original meeting of the creditors. But it is next objected, on the part of the syndics, that they had *no power to destroy the mortgage* created by this judgment, and they add, that *so soon as this shall be done by those who claim under it*, they are ready to make sale, and dispose of the proceeds according to law. Without stopping to notice the congruity of this objection, with the argument of surprise so much insisted on, it need only be answered that this power seems to be necessarily incidental, as has been justly observed by the court, to the larger power, confessedly vested in the syndics, of selling the property and liquidating the estate, and this even, independently of the statute of 1817. But by that statute it is expressly made the duty of syndics among other things to rescind mortgages on the insolvent's estate and to hold the proceeds subject to the lien that existed on the mortgaged property.—But it has been further objected, and that objection hath been both made and abandoned by the counsel for the syndics, that the statute of 1817 is not to govern the proceedings of this case, because, as the failure of the insolvents occurred anterior to the passage

of that act, the first proceedings, in relation to their failure, had been regulated by a different law. To this objection, if there were any thing in it, it might be answered it comes too late, after the election and appointment of one of their number [to fill the vacancy, occasioned by the death of E. Jones] under this very act, and which had been submitted to by the others, without appeal. But what reason has been alledged, why this statute should not be the governing rule of all future proceedings, as well of cases begun and pending at the time of its passage, and of those of subsequent origin? The provisions are of a general nature, and are evidently intended to be of general application. As well might it be insisted, that after the passage of an act, regulating generally the practice of the courts, all suits instituted before its adoption, should (and merely because they had been previously instituted) be conducted to judgment by a different rule from that which should govern the conduct and termination of new suits; which would afford us the harmonious view of judgments entered up at one and the same time, in one and the same court, one class of which, perhaps, would become final and obtain execution in half the time necessary to the maturity of the others. But answering objections of this kind, by more than a simple denial, seems to have all the

East'n District. *March*, 1819.

WILLIAMSON & AL. vs. THEIR CREDITORS.

awkwardness of endeavoring to establish by argument a self-evident proposition. But, it is objected, that the *syndics* of the creditors were *not competent parties defendant*, against whom to establish the demand of the plaintiffs, so that a judgment or final order of the court, against them, should be binding on the mass of the creditors, without previous personal notice to them individually; and, in short, that the plaintiffs' priviledged debt, could not be established as against the individual creditors, without having been discussed at a meeting of the creditors at large after personal notice; and that, however, the syndics themselves may be concluded by the answer, by which they have deliberately stated their objections, to the plaintiffs' judgment, and be restrained from introducing proof of fraud, or rather be refused a delay to seek proof of fraud (when fraud was not alledged) that still, as they are only agents, it is not fit that the creditors at large, (who must be taken to be third persons in regard to these parties) should be bound by their acts. But, in order to ascertain, whether the syndics be competent parties defendant, to suffer, for the creditors, the final judgment of the court in question, we have only to turn to the statute of 1817, for the regulation of insolvent proceedings: where we find it enacted in section the 30th, that the syndics are

competent, and the proper parties plaintiff or defendant in all suits, in relation to the insolvent's estate, and the interests of the creditors therein. We will turn also, to the case of *Brown* vs. *the syndics of Phillips and Kenner and Henderson*, 3 *Martin*, 270. By which, in a suit, *against the syndics* and not against the creditors, otherwise than through their syndics, it was finally adjudged that the syndics should pay to the plaintiffs the sum of $2000, with interest and costs—as a priviledged debt against the estate of Phillips. Was that judgment deemed ever afterwards examinable? Would the syndics have been afterwards allowed to come forward anew, and contend that as the creditors had not had personal notice of this demand, and had not been heard individually against it, they should be at liberty to open this judgment and alledge new pleas against the demand, as third persons who ought not to be affected by a decision, to which they were not parties? Need we turn also, to the case of *Ibanez* vs. *the syndics of Bermudez*, *id.* 17, in which the court decreed in favor of the plaintiff's debt, and that he had a lien on the house and land in question, and that it should be sold after the usual advertisements, and that the proceeds of the sale should be applied, first to the payment of his priviledged debt, although there were many other creditors, and the estate was insufficient for their

East'n District. *March*, 1819.

WILLIAMSON & AL. vs. THEIR CREDITORS.

payment? This decree was rendered, because it appeared to the court with sufficient clearness, that there were no *interfering* priviledged debts. The syndics had *not pleaded the existence of other priviledges* of an higher, or an equal degree, which there would be an insufficiency of estate to satisfy. The court, therefore, seeing their way clear, resolved to do justice at once, without exposing the plaintiff to useless delay and idle formalities, before he could realise the payment to which he was evidently entitled. We say, useless delay and idle formalities; for of what avail, the delay, or to what end, the formality of a citation to creditors individually, to object to, or to acquiesce in a tableau of distribution, before the execution of this decree; when it was already apparent from the *shewing of the syndics*, that there were no *interfering* priviledged debts? Finally, are not rules upon syndics to shew cause, why debts of high priviledge should not be paid at once, and without further delay, matters of every day's occurrence? But why should not the syndics be competent representatives of the creditors, for the purpose of establishing against them the debts of the estate, and the degree of their priviledge? Syndics are agents, elected by the creditors, and sanctioned by the court; with reference to fidelity, therefore, they must be presumed, to be worthy of

the utmost confidence; as to their comparative ability to defend the estate—their possession of all the books and papers, and correspondence of the insolvent, affords them the advantage of a more intimate and accurate knowledge of the state of his affairs, the extent of his engagements, and his means of resistence of unjust demands, than could be enjoyed by the scattered mass of individual creditors. Being creditors themselves, without any priviledge to their own claims, arising from their office, they have the same interest, that the individuals of the mass could have, to expose the injustice of groundless demands. Elected by the creditors, and appointed by the court, they have the additional inducement of the obligation of their trust, to excite them to vigilance in the discharge of their duty; and finally, the smallness of their number (being usually from one to three) affords them the further advantage of union of counsel, and concert, and vigor of action, in exerting their means of defence. This is a matter of practice, founded on the conbined rules of justice and convenience. The end in view is substantial justice to the creditors, to be pursued by means the least inconvenient; by rules admitting the fewest obstacles, arising from delay, confusion, negligence or ignorance. Now, the inconvenience of introducing here, the ancient Spanish

East'n District. *March*, 1819.

WILLIAMSON & AL. VS. THEIR CREDITORS.

practice, of which the counsel of the syndics have become enamoured (of requiring, in order, not merely to the classification of contended priviledges, but, establishing the very existence of every debt, and the nature of its priviledge, a notification to the creditors, individually to appear in a mass before the court, where each one in turn, and in person would be heard respectively as plaintiffs and defendants, to enforce his own, and repel all other demands) has been, perhaps, sufficiently apparent, in considering the benefits arising to the creditors, of their being fully represented by the syndics in all actions, concerning the estate of the insolvent, and the interests of the creditors. But, according to this tumultuous mode of proceeding, there would be some room for the application of the proverb, "that what is made the business of every body, would be soon found, to be the business of nobody." What confusion would be attendant, on the discussion of the budget of simultaneous demands, in the case of every considerable failure? Who should first be heard? Where should be stowed the crowd of witnesses, who might be necessary to establish the multitude of debts? Should *each one*, of perhaps of an hundred creditors, be heard against *every* demand? He, who wants proofs from China, and he who has his proofs in his pocket, how shall they assort their movements?

Shall he, who has been heard in support of his demand, await the return of, perhaps, an hundred commissions to parts beyond the seas, before he can have the satisfaction of knowing the decree which is to determine his rights? In fine, where is the judge, whose patience could support him, through the clamor, confusion, and perplexity of such a scene? Where is the creditor, for a small sum, who would not abandon the contest in despair? Convenience and justice, therefore, concur with the positive authority of our own statute, and the repeated decisions of this court and numerous decisions of inferior courts, from which appeals have not been taken, in establishing the competency of the syndics to represent the creditors in all actions in which either the estate of the insolvent, or the interest of the creditors are concerned; and if they can fully represent them, then they can, as an irresistible consequence, suffer judgments which shall be binding on the creditors. Of what avail then, will it be asked, will be the meeting of the creditors on the exhibition of the tableau, to shew cause, why it should not be homologated? We answer, certainly none, nor will they be permitted to question a judgment solemnly rendered against the syndics, their representatives. If they could, their judgments would be liable to be reversed in some

East'n District. *March*, 1819.

WILLIAMSON & AL. vs. THEIR CREDITORS.

other way than by appeal, or a *reconsideration of this court*, on an application made, within eight days after judgment pronounced. As a matter of practice, what then, is the *usual* and *principal* object of such a meeting of creditors ? The existence and the nature of debts against the estate are presumed to have been already established, as is the usual course in judicial discussions with the syndics, as plaintiffs or defendants; in all cases of dispute, and, *at least, wherever it has been done*, it has been *done effectually;* for the syndics were their representatives. In such previous discussions, questions touching the *absolute right* of the creditors, against the insolvent are settled, and, so established, nothing could hinder the right, from becoming available to the creditor, but the *previous*, seasonable interposition of the syndics, either by the exhibition of a tableau, or otherwise, *shewing, to the satisfaction of the court, the existence of other debts* of an *higher or an equal priviledge*, and an insufficiency of estate to meet both demands. In such case, before payment, and only in such case, the classification of debts by a tableau of distribution might become necessary. And then the *relative*, in addition to the absolute, rights of the creditors, would be established in a discussion, by the creditors to be called for that purpose, of the propriety of the adjustment, adopted by the syn-

dics in their tableau ; as well of the order of priviledges, as of the relative position of the creditors of each particular order. In all cases, that tableau of distribution, on account of the disposition of the funds, must be finally rendered to the court, and the creditors called to shew cause, why it should not be approved. But the necessity of *finally rendering that account of their administration* is no apology for the syndics, for *retaining all the funds of the estate, until that final account be rendered.* They must know, whether there exist, and to what extent, *interfering* claims to hinder the payment of any particular priviledge. The judgment of this court, for instance, would be to them a full justification. And when on a demand of payment from the syndics, of a particular priviledged debt, it is made *manifest to the court* by *the defence of the syndics* that there does not exist any other priviledged debt, of an equal or an higher degree, that is any *interfering* priviledge, to hinder its judgment, out of the proceeds of that part of the estate, on which the creditor has a lien, the court will at once, and without, circuity decree as in the cases of *Brown* and *Ibanez* and a multitude of others, not merely the existence of the debt and its priviledge, but that the proceeds of that part of the estate, on which it attaches, shall be applied towards its extinc-

East'n District. *March*, 1819.

WILLIAMSON & AL *vs.* THEIR CREDITORS.

tion, so far, as they may be sufficient, for that purpose. Would this not be justice? Could the creditors be injured by the effect of this decree? What could be gained by them, *as against this decree*, by previously summoning them to discuss a tableau of distribution, when it is apparent, *from the shewing of the syndics*, that there are no priviledged debts, to claim a *competition*, with the debt in question, except the costs and expenses of justice, and which there are abundant funds to satisfy? Is it true, in the sense in which it is objected by the defendants, that the creditors are *third* parties, in regard to this judgment against the syndics? That as to the creditors it is *res inter alios acta?* Were they not elected by the creditors, and confirmed by the court as their representatives? Are they not so made by our statute? And are they not themselves creditors? United in interest with the other creditors, and enabled by their situation to make a better defence, than the mass of creditors could do? But it is said, they might neglect their duty, or abuse their trust! So a man, blessed with the use of his senses, might become a glutton or a drunkard, or otherwise abuse them, merely in licentious pleasure. Would it follow, that they were not the proper organs of life, and rational enjoyment? There is no more reason, why the mere fact, that there

has not yet been a final homologation of the accounts of the syndics, should be an obstacle to that part of the decree which directs a payment over of the proceeds of the mortgaged property, to the plaintiffs, the judgment creditors, that the like fact, could have been objected to the execution of the decrees, in the case of *Brown* against *the syndics of Phillips*, or of *Ibanez* against *the syndics of Bermudez*, or of a multitude of similar decrees; and which was never before imagined. In this country emphatically, the course of justice will not be suffered to be impeded, or entangled by mere forms. And if there be no other objection to this decree, than that the creditors have not been notified personally, to shew cause, why the *accounts of the syndics* should *not be homologated*, as it is apparent, that they would not be able to shew for cause, the existence of higher, or equal, or *any other* privileged debts (with the single exception, that has been mentioned of costs and expenses) they could have no cause to shew, that could touch the present question; so far as it is objected to this decree, that such a meeting of creditors has not been *previously* summoned. If then, *on the supposition of this judgment debt* having been *validly established, as against the syndics*, it be competent for the court, on discovering from the pleadings that there are no *interfering* privileg-

East'n District. *March*, 1819.

WILLIAMSON & AL. *vs.* THEIR CREDITORS.

ed debts, to order *at once* the payment over of the proceeds of the property affected by it, as far as they may go towards its satisfaction, the objection resolves itself simply and truly into this, that *the syndics are not competent parties to suffer a judgment which shall be binding on the creditors*, but that before it can become valid, as against them, they also must be cited, and be at liberty to plead to the demand in person. This objection, thus stripped of its disguise, has been already answered, by a reference to the statute and to the repeated decisions of this court and others, shewing the authority of the legislature, co-incident with a settled course of practice, and with reason, justice and convenience.

But it is contended by the defendants, under the *bill of exceptions*, that even, as *against the syndics themselves*, the judgment of the court is erroneous, because, against the recovery by the plaintiffs, under their original judgment, the syndics, on the hearing, offered *to go into evidence*, to shew that it was not merely null, but *fraudulent and collusive* as against the creditors, and were *overruled*, on the ground that fraud and collusion, *not having been alledged* in their answer to the rule, was *not in issue* between the parties. In support of this objection, it is contended—1st. That evidence is a generic term, and, in its *full latitude*, will comprehend, as well

the *record* of the judgment, on which the plaintiff's themselves relied, (and which, they say, was "*in fact*," part of the evidence, they were refused leave to introduce) as proof, by witnesses, or otherwise, which they might have introduced to establish fraud. 2nd. That it was *not necessary*, expressly, to *alledge fraud*, in order to be permitted to introduce proof of it, and that to object to proof of fraud, for want of such allegation, is a nicety, which the liberality of our laws and practice must forbid. 3d. That fraud was *sufficiently pleaded* in the allegation of *nullity*, and in the further allegation that the judgment did *not confer* on the plaintiffs *a priviledge* over the other creditors.

With regard to the first branch of the objection, however extensive may be the signification of the word evidence, taken in its utmost latitude, we are *at issue*, with the defendants, *as to the fact*, that they were, as they now contend, refused leave to open and point out the error and nullity of that document, which was the very foundation of the plaintiffs' demand and one of the records of the court, which is minutely described and referred to in the rule, as being under the eye of the court, and the moving cause of its compulsory proceedings, and final decree against the defendants. If so extraordinary a refusal had been made, if such an arbitrary power had been

East'n District. *March*, 1819.

WILLIAMSON & AL. *vs.* THEIR CREDITORS.

exerted by the court, as to inhibit to the defendants a resort to that evidence o their defence, which was permitted to the plaintiffs, and without which, in the nature of things, the court could have made no decree, and which the court, in its own orders, professes to be acting upon, ought not the fact to be made to appear before this court by affidavit? Ought it not, at least, more distinctly to appear, by form of exception, than by the loose and general words, "*that they offered to go into evidence?*" In reference to which, the court say "*the offer was made by consent,*" and that "*no evidence was produced by them.*" Does not the *very expression* "the defendants offered to go into evidence," obviously imply that *the plaintiffs had* already *gone into evidence* in *support* of their demand? And that the defendants offered to go into evidence, *on their part, other,* than *that* which had been gone into on the part of the plaintiffs? If not, for what possible purpose, could the defendants desire to resort to evidence of fraud and collusion? Was it to resist an *unsupported* demand? Was not the "*onus probandi,*" in this, as in all other cases, on the plaintiffs? And if they had proved nothing, must it not be presumed they would have recovered nothing, even in the court below? Or, at least, that in this court, the defendants might be sufficiently assured of safety against an imaginary demand.

This *new* idea, therefore, that there was no evidence, even of the original judgment, before the court below, in support of the plaintiffs' demand, but ill comports with the defendants' exception to the refusal of leave to go into evidence, to prove that judgment fraudulent and collusive. And, is not the presumption irresistible, that the record *was* in evidence before the court, when without that fact, the conduct of the defendants' counsel, in taking such exception, would seem to approximate very near to absurdity? Indeed what part of the pleadings leaves room to doubt of the fact, that the record of the original judgment was before the court? Is it not minutely described in the rules of the 3d of March, and the 6th of May, as making part of the records of the court; as having been read before the court—as being the ground work of the plaintiffs demand? And do not the defendants themselves, in their answer of the 9th of May, declare the mortgage, created by the plaintiffs' judgment, an insuperable obstacle, to the sale of property to which it adheres, and that *when the plaintiffs, who claim under it, will remove that incumbrance*, the defendants will be ready to liquidate that part of the estate. Finally, do they not further answer, that, *that* judgment is *null*? We ask, what judgment? If *nothing* were before the court below? But, why have we not something more than pre-

East'n District *March*, 1819.

WILLIAMSON & AL. vs. THEIR CREDITORS.

sumption, to inform us what was before the court below ? Or, at least, a certificate of the judge below, that it was not, after all, in evidence before him ? Is it not according to our rules of practice, the duty of the *party appealing* from the decree, to make out, prior to the prosecution of the appeal, with the consent of the opposite party, ro under the sanction of the court, an exact statement of the evidence, on which the decree is founded ? If he neglect to prepare such statement, is that neglect to be perverted into proof, that there was no evidence ? Or rather will not this court presume in such case, every thing in favor of the decree of the inferior court, and especially, that it was founded on evidence proper to sustain it ?—2d. The defendants contend, in the second place, in support of their bill of exceptions, that fraud need not be specially pleaded, in order to be offered in evidence, and that to object to such evidence, for want of such a plea, is a mere nicety of practice, which our rules of proceeding must always forbid.

3d. That if necessary, to be pleaded in order to be proved, it is sufficiently pleaded in the allegation, that the judgment is *null* and *does not confer a priviledge* on the plaintiffs.

These arguments in support of the *bill of exceptions* shall be considered with the uimost brevity. In the first place, this objection, to the

want of a plea of fraud is not of form but of substance. Fraud, if it exist, whether infecting a contract or a judgment, being a vice that shuns observation, there can be nothing, on the face of the subject matter of the demand, that can awaken the expectation of such a defence. If, therefore, it were not required to be expressly alledged, the party, against whom it is sought to be given in evidence, would be unjustly surprised. And why should it not be exacted of him, who would prove it, that he should first have distinctly alledged it? There is no understanding so obtuse, as not to be able to comprehend the difference between fraud and good faith. There are no talents so humble, as not to be able to express it, so as that it may be clearly distinguished from all others pleas, whether of form, or of substance. It is not required of him who would adduce proof of fraud, that he should have shaped his allegation, according to any prescribed form of words, or subtle rule of pleading. It is required only, that it should be distinctly and frankly expressed without insinuation, or equivocation, so as that the party against whom it is alledged, may at once be apprised of so serious a charge, and may be fully prepared to vindicate himself against it. To exact thus much of every party, who would resort to so recriminating a means of defence, is demanding

East'n District. *March*, 1819.

WILLIAMSON & AL. vs. THEIR CREDITORS.

merely that plain dealing, that is due from man to man, in the humblest situations and simplest intercourse of life. The condition, therefore, on which a man shall have leave to adduce proof of fraud against his adversary, is not less easy to be fulfilled, than to require it, is but a reasonable shelter against surprise and, often, against the most serious injuries to character and property. It is a settled maxim of law (for which authority need not be quoted) that fraud is not to be presumed. It is especially not to be presumed, against a solemn judgment of a court without appeal, rendered only after years of litigation and long prior to the failure of the insolvents. The subsequent failure, therefore, of Williamson and Patton, two of the judgment debtors, nine or twelve months afterwards, cannot be pretended to take this case out of the operation of the general rule. If, therefore, there be no hardship in requiring the previous allegation of fraud from him who would adduce it in proof—if not to do so, would be an unjust surprise upon him, against whom such proof is sought to be produced—if it be a settled principle of law, that fraud is not to be presumed, with what show of reason, can it be maintained, that such an express allegation is not an indispensable preliminary to the introduction of such evidence? But, it is urged against the necessity of this plea, to open the door to such proof, that even if the allegation of

fraud had been expressly made, that fraud has so many forms, that we should be nothing the wiser for it—that such a plea would afford no indication of the particular proof, by which it would be supported, any more than if it had not been pleaded at all. But, if fraud be of so protean a character, that even when it is charged, conjecture cannot easily light on its particular form, how much *more* unprepared must that party be to resist such evidence, against whom it is not alledged at all? The argument drawn from the nature of fraud, therefore, seems to conclude strongly against the defendants, in favor of the necessity of alledging it, before evidence of it shall be admitted? Is the objection then, to silence, on that subject, in pleading, a nice and captious one? Or rather, does it not tend to the detection of artifice, by requiring that fairness and frankness, that is due from one person to another in every situation, and is indispensable to the safety of every one, who is driven to a legal contest for the enforcement of his rights? But, it is added, by the defendants by way of illustration, that in an action on a promissory note, the defendant, under a plea of general denial might prove a forgery, and that forgery is as serious a charge as fraud; but the defendants' counsel answer their own argument (so far as it is helped by this illustration) by observing that it

East'n District. *March*, 1819.

WILLIAMSON & AL. VS. THEIR CREDITORS.

is incumbent on every plaintiff, to make out his own cause of action by proof, and the very first step of his proof, in such case, must be sufficient evidence of the genuineness of the hand writing of those who have signed or attested the instrument, and which, of course, may be contradicted by the defendant. We leave this part of the subject, with this single observation, that by our rules of practice, every answer must fully and freely disclose the nature of the defence, with every proper explanation of time, place and circumstance.

It is urged by the defendants, in the third branch of argument in support of their bill of exceptions, that if, after all, fraud and collusion must be alledged, in order to justify the introduction of proof of it, it is sufficiently pleaded in the allegation that the judgment *is null*, and does not confer a priviledge *?* As to the latter branch of this plea, it seems to be merely a conclusion from the first, and, as such, surplussage. In any other point of view, it amounts to the untenable position, that a judgment debt, by its nature, does not confer a priviledge; or, is it meant to be said, that this is that part of the plea in which fraud is sufficiently pleaded *?* If so, then *nil debet* or *nul tiel record*, or any thing else, would be a good plea of fraud, in other words, that fraud would be sufficiently pleaded when it

is *not* pleaded: *id est*, that it is not necessary to be pleaded at all, which is getting back to the first branch of his argument. But to return, are fraud and collusion sufficiently pleaded in the allegation that the judgment *is null?* If so, then fraud and nullity are synonymous terms, for we have seen that fraud must be expressly alledged, and is not to be gathered by implication from other parts of the pleading. Now, did the defendants really mean fraud and collusion, when they pleaded that the judgment was null? No, for they tell us, in a former part of their argument, that the record of the judgment itself was, "*in fact*," an essential part of the evidence on which they meant to rely, that they intended to shew, from the face of the judgment, that it was null, and this, if they could have succeeded, would be proper and regular enough; a species of proof in strict conformity to their allegation. But can it be gravely maintained, that it is one and the same thing, to alledge that a judgment is null, and that it was obtained by fraud and collusion? One plea presents a question of law fit solely for the court, the other alledges matter of fact, that may be proper for the investigation of a jury. But in lieu of all further argument on a part of the subject so plain, and on which, it is believed, the court entertain no doubt, we will conclude with this single observation, that there

East'n District. *March*, 1819.

WILLIAMSON & AL. vs. THEIR CREDITORS.

is one essential difference between these respective pleas, a judgment that is null is void, *ab initio* a judgment obtained by fraud and collusion; is, at most, only *voidable*. Therefore, independently, of the plain common sense difference between them, the allegation of the one cannot be the allegation of the other.

The following points then are considered as established on the part of the plaintiffs.

1. That the plaintiffs are *judgment creditors*, of Meeker, Williamson and Patton, for $40,711 92, by a judgment of the late superior court, of the territory of Orleans, of the twenty-seventh of July, 1811.

2. That the house and lot in question, was partnership stock of the firm of Meeker, Williamson and Patton, which had expired, prior to the failure of Williamson and Patton in February, 1812.

3. That there are no other priviledged debts against the estate, except costs and expenses, (which there are more than sufficient funds to satisfy,) as is manifest from the account and tableau exhibited by the syndics, and from their omission to allege, in their answer, the existence of any interfering priviledges.

4. That, the plaintiffs pursued the right course to enforce the payment of their debt in proceed-

ing by rule, setting forth their character of judgment creditors, the sum, the date, the parties, and the court, and were not bound to proceed to an action of debt on their judgment, with the form and expense of petition, and citation. That such actions would have been odious and vexatious, and uselessly expensive, and, especially, as against an insolvent estate.

5. That the defendants were not surprised, being bound to notice the existence of the plaintiffs' priviledged debt, at least, ever since the failure, and this, not only from the records of the court and of the recorder of mortgages, but from the oath of the plaintiffs' agent, at the original meeting of the creditors, and, being also actually apprised of it, as is evident from their own answer complaining of it, as an incumbrance, and from the repeated efforts of the plaintiffs, to compel the defendants to answer at all.

6. That the statute of insolvency, being of a general nature, was intended to operate upon all further proceedings in cases of insolvency, then pending as well as on those of subsequent origin.

7. That the defendants had power to raise the mortgage created by the judgment, as well by the nature of their office, as by the statute of insolvency of 1817.

8. That the syndics are competent and com-

East'n District. *March*, 1819.

WILLIAMSON & ALL vs. THEIR CREDITORS.

plete representatives of the creditors, as plaintiffs or defendants, in all suits, concerning the estate of the insolvent and the interests of the creditors. That this is apparent, as well from the statute of 1817, as the repeated decisons of this court and the rules of reason, justice and convenience.

9. That consequently, a final judgment pronounced against the estate, represented by the syndics is conclusive against the creditors, without any personal notification to them.

10. That on a demand of payment, of a privileged debt against the syndics, if it be made manifest to the court from the shewing of the syndics, that there are no interfering privileges; the court will at once, and without circuity proceed to decree not only in favor of the debt and its priviledge, but payment also, as was done in the cases of *Brown* vs *syndics of Phillips* & *Ibanez* vs. *syndics of Bermudez*, and is done every day in cases of high priviledge.

11. That the necessity, on the part of the syndics of rendering a final account of their administration subject to any objections, from the creditors as to the classification of debts, is no sufficient reason for retaining to the injury of priviledged creditors ,all the funds of the estate until the exhibition of that final account, that the existence and extent of interfering priviledges, can-

not be unknown to them. That the judgment of the court will always protect faithful syndics. The argument founded on the possible abuse of their trust, by collusion with a particular creditor, is radically unsound, and might equally be employed to overthrow every human institution.

12. That the record of the judgment of the late superior court was evidence before the court below, and the very foundation of the plaintiffs' demand and of the decree of the court, and that the defendants were not debarred the use of evidence permitted to the plaintiffs, nor any advantage, that an attempt to exhibit the nullity of the judgment could have afforded, as is manifest from the whole face of the proceedings, and is strikingly evinced by the fact that the defendants thought fit to except to a refusal of leave "to prove that the judgment itself had been obtained by *fraud and colluston.*"

13. That, if there could be any doubt as to what was evidence in the court below, that doubt must conclude against the defendants, and in favor of the judgment of the inferior court; for it was incumbent on the defendants as parties appellant, to have prepared, or caused to be made a statement of facts.

14. That the judge of the court below, did not err in refusing leave to the defendants to go into evidence (or rather time to seek evidence) of

East'n District. *March*, 1819.

WILLIAMSON & AL. *vs.* THEIR CREDITORS.

fraud and collusion, because it was not in issue between the parties.

15. For, evidence of fraud and collusion cannot be admitted, when it has not been expressly alledged. That otherwise the party, against whom it is produced, is surprised. That this is not a captious objection, requiring any particular skill or pleading, but is equally supported by the principles of law and justice, and of consequence, that

16. Fraud and collusion were not sufficiently pleaded by the allegation that the judgment is null, and does not confer a priviledge; the latter allegation being but a conclusion from the first, in any other point of view, amounting merely to the untenable position "that a judgment, by its nature, does not confer a priviledge," and, certainly not amounting to an express allegation of fraud and collusion: the former part of the plea, to wit:—that the judgment is *null*, being equally far from an allegation of fraud and collusion—nullity and fraud not being convertible terms. The former, presenting a question of law for the court; the latter, matter of fact for the jury, and a judgment that is null being *void ab initio*—a judgment, obtained by fraud and collusion, being, at most, only *voidable*.

DERBIGNY, J. delivered the opinion of the

court. A rehearing has been granted in this case, with a view principally to obtain a more particular investigation of the following questions, which, on the first argument, passed almost unnoticed;

1. After the filing of the tableau of distribution, by the syndics of the creditors of Williamson and Patton, was a general notice to all the creditors, an indispensable formality, which the syndics had no right to wave?

2. Under the general refusal, to let the appellants go into evidence, to prove that the judgment relied on by the appellees was null, collusive and fraudulent, were the appellants deprived of their right of shewing nullities, apparent on the face of the record of that judgment?

To come at a correct decision of the first question, we must previously ascertain, by what law the proceedings in this case are governed. This is a case of *cessio bonorum* in 1811, consequently, after the repeal of the insolvent act of 1805, by the act of 1808, which last act, as it provided only for the relief of debtors in actual imprisonment, left other cases to be regulated by the ancient laws of the country. Under those laws, then the voluntary cession of goods in this case was made, and by those laws it ought to be governed. But in the application of those laws, to

East'n District. *March*, 1819.

WILLIAMSON & AL. vs. THEIR CREDITORS.

the question under consideration, some embarrassment must result from the changes introduced by the practice of our courts in the manner of conducting the proceedings in cases of this nature. Before a Spanish court, in a case of *cessio bonorum*, each creditor pursues his own claim individually: he is notified of all the other demands, and may debate and oppose them. Upon all those claims collected together, the judge pronounces by one single judgment, classing the creditors according to their rank, and ordering them to be paid in that order. The person appointed, under the name of administrator of the insolvent's estate, has no other power than that of administering the property and collecting the debts; he has no right to interfere in the claims of the creditors. With us, the practice has been introduced, (probably borrowed from the ordinance of Bilbao) for the creditors to appoint one or two common agents, under the name of syndics, whose powers, before the enactment of the law of 1817, had never been well defined, but whose business was understood to be that of taking care of, and administering the property surrendered, and of doing all needful acts towards preparing a final settlement and liquidation of the common estate, agreeably to the provisions of the afore-mentioned ordinance, which vests the syndics with those powers and no more,

and always reserves to the creditors, the right of debating and approving, or opposing what is done through the course of proceedings until the end.

In our courts these syndics sued, and were sued, as the representatives of all the creditors; the individual creditors themselves not appearing, except in opposition to the syndics, when they refused to admit their claim.

But, although the general mode of preparing the liquidation of the estate was so far altered, yet, when the time was come, finally, to pronounce upon the respective claims of the creditors, and to class them according to their rank, it was the invariable practice of our courts to cause general notice to be given to them all, through the newspapers, informing them that the tableau of distribution of the proceeds of the estate was laid before the court, and calling on them to shew cause why it should not be approved. By that general advertisement, the most important part of the Spanish proceedings was preserved, to wit, the opportunity given to each creditor to support his own right, in opposition to the claims of the others, and, of course, against those of the syndics themselves, whose interest, upon that occasion, was adverse to that of their constituents.

Under that practice the present syndics were

East'n District, March, 1819.

WILLIAMSON & al. vs. THEIR CREDITORS.

appointed; and by that practice their conduct must be governed. They had no power to represent the creditors where the rules, under which they were named, required the creditors themselves to be called. The consequence of this must be that, if they undertook to act for them on such occasion, their act is null, the proceedings irregular, and their consent to wave the irregularity, not binding, because they had no right to give it.

The appellees have maintained that the law of 1817, not the ancient laws, ought to be the rule by which all the proceedings, had in this case since its enactment, should be governed. Should we acquiesce in that opinion, the cause of the appellees would not be advanced thereby, for, by the 85th section of the act, it is expressly provided that, on the filing of the statement or tableau of distribution, notice shall be given to the creditors by bills or publication, that they may show cause, within ten days, why it should not be homologated.

The case of *Brown* vs. *Kenner & al.* 3 *Martin*, 270, is relied on as one which furnishes a precedent of a dispute between a creditor and the syndics, decided upon without the presence of the other creditors. But in that case, the question here examined, was not raised.

We do not feel at liberty to enquire into the

particular circumstances of this case, and to lay aside the rules by which it ought to have been governed, in order to ascertain, ourselves, whether there is or not any creditor, of this estate, who can claim preference over the appellees. The tableau may, as they assert, shew that there is none; but this is begging the question; for if this tableau was to be laid before all the creditors, to be assented to or opposed by them, it is not conclusive, *now*, as to any thing that it contains.

This view of the case, precludes any necessity of investigating the other question. The judgment of this court must be altered, and the parties replaced where they were before the rule, complained of by the appellants, was obtained.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be reversed, and that the parties be replaced in the situation in which they respectively stood, before the rule of the 6th of May last was granted; and it is further ordered that the appellees pay costs.